UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASE NO. 31-CA-230714

ADT, LLC, d/b/a ADT Security,

Respondent,

and

International Brotherhood of Electrical Workers, Local 42

Charging Party.

RESPONDENT ADT, LLC, D/B/A ADT SECURITY'S POST-HEARING BRIEF

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COMES NOW Respondent ADT LLC d/b/a ADT Security Services ("ADT" or the "Company"), by and through its attorneys and pursuant to Section 102.42 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, submits this Post-Hearing Brief to Administrative Law Judge Arthur J. Amchan in connection with the above-captioned proceeding.

STATEMENT OF THE CASE

The Company and International Brotherhood of Electrical Workers, Local Union 43 (the "Union") (collectively as the "Parties") had a collective-bargaining relationship spanning some years and covering a bargaining unit based out of Albany, New York. (Tr. 64).[1] The latest collective-bargaining agreement was effective by its terms from June 11, 2015, through June 10, 2018. (GC Ex. 6).

The Parties convened an initial meeting concerning a successor agreement in May 2018 and, at a minimum, exchanged outlines of bargaining topics. (Tr. 91:3-17). Formal bargaining sessions occurred on September 7, 2018, and October 18, 2018. (Tr. 64:13-18). On October 18, 2018, after just a few meetings, the Parties reached a full tentative agreement on all pertinent terms, subject to ratification. (Tr. 64:17-18, 98:22-99:5). The parties fully understood that the full tentative agreement, once ratified, would serve to block any decertification or withdrawal of recognition. (Tr. 99:13-20, 247:20-25).

During the course of negotiations, a Company junior manager, wholly inexperienced in union-related matters, issued communications to bargaining unit members. (GC Ex. 2, 15; Tr. 210:24-213:18, 239:10-240:13). The communications occurred on approximately October 9,

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[1] References to the transcript of proceedings are designated as (Tr. [page]:[line(s)]). References to the Respondent's and General Counsel's Exhibits are designated as (R. Ex. ___) and (GC Ex. ___), respectively.

2018. (GC Ex. 2, 15). On October 16, 2018, the Union objected to these communications, and brought them to the attention of the Company's Senior Director of Labor Relations for North America, James Nixdorf ("Nixdorf"). (GC Ex. 7; Tr. 231:13-16, 239:18-240:24). The Union additionally threatened to file an unfair labor practice charge absent the Company's "disavowal" or "retraction" of the junior manager's comments. (GC Ex. 15; Tr. 239:20-24).

On October 18, 2019, the Company issued such a "disavowal" or "retraction." (R. Ex. 1, 3). Due to a spent battery on Nixdorf's computer, the "disavowal" was sent using the computer of Union Officer Alan Marzullo ("Marzullo"), after the Union's review and acceptance of the communication as sufficient. (R. Ex. 1, 3; Tr. 135:13-136:13, 139:1-22, 241:2-13). Later that afternoon, of course, the Parties reached full and complete tentative agreement on all topics. (GC Ex. 4; Tr. 99:4-5, 247:5-16).

Put simply, the Union demanded, and the Company provided, a full and complete disavowal or retraction of any improper statements made by Company management. (GC Ex. 15). On the same day as the disavowal, the Company offered, and the Union accepted (subject to ratification), a full tentative agreement on all bargaining topics. (GC Ex. 4). Again, *both* parties (particularly the Company) fully understood that this tentative agreement would block any decertification or withdrawal of recognition once ratified. (Tr. 99:13-20, 247:20-25). These facts, each of which is wholly undisputed, render the vast majority of the General Counsel's presentation as meaningless, if not preposterous.

The transcript in this matter spans some 280 pages and includes no less than thirty-two (32) General Counsel Exhibits. The record is replete, with largely unsubstantiated conspiracy theories designed to distract from the rather straightforward issues in this Case. At various junctures, the General Counsel advances absurdities: (1) the Company manipulated and delayed a ratification

vote within the Union's sole and exclusive control based upon unsubstantiated Company clairvoyance that a decertification effort would occur during the delay (Tr. 71:20-72:10); (2) the Company transferred an employee from Orem, Utah to Albany, New York, for the purpose of pursuing a convoluted decertification "scheme" (Tr. 183:4-184:22); and (3) internal Company discussions concerning the impact of the closure of the physical Albany, New York office and associated clunky word choice reveal an insidious Company "plot" hatched in 2017-2018 to decertify a workforce of unknown composition months, if not over a year, into the future. (GC Ex. 28-30; Tr. 233:15-235:25). All of these contortions cannot escape the undisputed facts.

The undisputed key facts listed above illustrate the glaring reality that no rational employer would embark upon these schemes only to fully undermine the alleged effort by reaching a full tentative agreement after only two (2) or three (3) bargaining sessions. (GC Ex. 4; Tr. 99:1-12, 247:5-16). More significantly, the General Counsel's theories utterly fail to address the nature of the Union's interaction with its constituents in this matter.

As detailed below, at all material times, the Union essentially operated as a "representative of one." Employee John Brady ("Brady") tellingly testified: "**I** would happi[ly] look [the tentative agreement] over and look at ratifying the contract," and "**I** – **I** ratified the contract." (Tr. 30:9-12) (emphasis added). Union official Richard Godden ("Godden") echoed this reality: "I knew that it was—what we had negotiated was favorable to **John Brady's** wishes." (Tr. 76:4-5) (emphasis added). Only Brady, in fact, was offered, or had any input into, bargaining objectives or related communications into the proposed collective-bargaining agreement. (Tr. 89:25-90:8).

The corollary reality is that the Union utterly and fully ignored the other two (2) employees involved in this matter (David Hardy ("Hardy") and Kenneth Johnson ("Johnson")). (Tr. 35:5-9). As early as May of 2018, Union Official Godden understood that Hardy "was not into the Union

thing." (Tr. 83:13-16). No record evidence suggests the Union took any steps to secure Hardy's support. Johnson, likewise, did not express any desire to support or join the Union at any time. (Tr. 55:1-18).

The undisputed sequence of events in this matter further underscore the Union's indifference to its constituents and its consequences. The Company **did not** withdraw recognition or *rely in any way* on any employee dissatisfaction related in any way to the unfortunate October 9, 2018, communications. (GC Ex. 2, R. Ex. 5; Tr. 246:1-21). The Company not only fully ignored employee responses to the October 9, 2018, missive, it reached a tentative agreement with the Union that would "slam the door" on any decertification effort once ratified. (Tr. 246:25-247:25). Without question, the "triggering event" for employee dissatisfaction has nothing to do with the October 9, 2018, communication or an obtuse Company "anti-union plot."

The triggering event is clear. After conducting bargaining "according to employee Brady's wishes," the Union belatedly reached out to the two (2) other bargaining unit or potential bargaining unit members. (Tr. 76:4-5, 82:10-16). Godden claims to have contacted Hardy and Johnson, but failed to ever discuss proposed contract terms with them. (Tr. 82:19-23). In the weeks following the tentative agreement, the Union did invite Hardy and Johnson to participate in a ratification vote, only to see those efforts rebuffed. (Tr. 94:2-9). On the day of the ratification vote (November 2, 2018), employee Hardy explicitly informed Godden that both Hardy and Johnson intended to "vote down the contract." (Tr. 95:1-96:5). Godden told Hardy that joining the Union was a prerequisite to voting on the contract and, **further**, told Hardy the Union intended to plow ahead, despite any misgivings of Hardy and Johnson. (Tr. 95:5-11).

Godden's heavy-handed brand of industrial politics had the predictable result. In the early afternoon and shortly prior to the ratification vote, Hardy contacted Nixdorf and verbally expressed

the Union's lack of majority support. (Tr. 256:8-15). Written documentation of this fact followed shortly thereafter. (GC Ex. 10). This failure of the Union to effectively engage its constituents (and not any ill-advised Company communication) prompted the loss of majority support and the withdrawal of recognition. No other conclusion is defensible or consistent with the Record. Indeed, the Union knew as early as May 2018, that either 50% or 33% of the overall bargaining unit "was not into the union thing." (Tr. 83:13-14). Union supporter Brady, at a minimum, understood that Johnson had not expressed support for the Union over a prolonged period of time. (Tr. 55:14-18). The Union ignored these employees and, instead, proceeded as if it represented Brady, alone. No General Counsel conspiracy theory or distraction can evade this fundamental truth.

UNDERLYING PROCEEDINGS

On or about March 1, 2019, an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing was issued by the Regional Director of Region 3 alleging ADT violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act"). The Consolidated Complaint advances Case No. 03-CA-230714 (dated November 8, 2018) and Case No. 03-CA-234585 (dated January 24, 2019). (GC Ex. 1). On March 15, 2019, ADT filed its Answer to the Consolidated Complaint, denying most of the Consolidated Complaint's allegations. (GC Ex. 1(r)). A hearing took place on Wednesday, April 17, 2019, before Administrative Law Judge Arthur J. Amchan, in Albany, New York. (Tr. 1, 6:3-9).

STATEMENT OF FACTS

A. ADT's Albany, New York Operations

ADT is a national corporation providing electronic security systems and services, including the installation of residential and commercial security services. *ADT, LLC,* 365 NLRB No. 77, at

*1-2 (May 17, 2017). The Company's operations include a workforce servicing the Albany, New York area. (Tr. 233:4-234:11). Prior to the events at issue in this matter, the Union represented a small bargaining unit working out of Albany. (GC Ex. 6; Tr. 233:18-23). Previously, the Albany operations included a physical office building housing non-bargaining unit support personnel. (Tr. 233:4-10).

In September 2017, ADT closed the physical Albany, New York office building, but the closure did not interrupt the bargaining unit's work. (Tr. 233:25-234:11). The Company and Union discussed the closure and various options designed to maintain the bargaining unit or, alternatively, combine the Albany unit into a larger Union (IBEW Local 43) bargaining unit working out of Syracuse, New York. (Tr. 234:19-235:6). These discussions focused on the contractual recognition clause, and had nothing whatsoever to do with majority support, decertification or withdrawal of recognition. (*See generally*, Tr. 236-8).

B. Pertinent Bargaining History

Nixdorf serves as the Company's Senior Director for Labor Relations in North America. (Tr. 231:16). In this capacity, Nixdorf administers and bargains approximately thirty-five (35) collective-bargaining agreements throughout the United States and Canada. (Tr. 231:21-23).

Specific to Albany, Nixdorf handled the last three (3) or four (4) bargaining cycles dating back to approximately 2006. (Tr. 241:22-242:1). While aware of union rights generally contained in various constitutions and by-laws, Nixdorf never had any union (including the Union in this matter) agree to a contract without first submitting the proposal for ratification. (Tr. 242:5-243:8). With respect to 2018 Albany negotiations, the Union never raised the prospect of foregoing a ratification procedure. (Tr. 242:5-13).

The Albany bargaining history has always included at least the tacit understanding that ratification constitutes a prerequisite to contract finalization. (*See generally*, Tr. 241-43). As recent as the 2009 bargaining cycle, the Company and the Union reached separate tentative agreements covering the Albany and Syracuse bargaining units. (R. Ex. 4; Tr. 243:13-14). The Union submitted both offers for ratification, and both failed. (R. Ex. 4; Tr. 243:17-244:9). As a result, the parties returned to the bargaining table in order to reach final agreement acceptable to the impacted employees. (R. Ex. 4; Tr. 243:22).

C. The Onset of 2018 Negotiations

On June 10, 2018, the most recent Albany collective-bargaining agreement expired by its terms. (GC Ex. 6). While there is some dispute as to whether the meeting constituted an official "bargaining session," the parties clearly met in May 2018, to, at a minimum, discuss broad sketches of bargaining topics. (Tr. 91:3-17). Indisputably, formal bargaining next occurred on September 7, 2018. (Tr. 64:16). Nixdorf, at all times, represented the Company. (Tr. 231:19-20). The Union was represented by Godden and Marzullo, with employee Brady attending at least one (1) meeting. (Tr. 29:2-25, 64:20, 169:21-23).

D. Communications Involving Manager Benjamin Clark

Benjamin Clark ("Clark") serves as the Company's Vice President of Central Operations. (Tr. 210:21-23). Clark lacks any experience or training regarding management in a unionized environment, and took over responsibility for the Albany area as of September 1, 2017. (Tr. 210:24-211:3). At some point during the course of negotiations, employees Johnson and Hardy contacted Clark to relay that they had been contacted by the Union. (Tr. 172:19-23). Johnson and Hardy also expressed various concerns. (Tr. 172:19-23).

In an attempt to respond to the employees and following some cursory Internet research, Clark drafted the following communication and directed it to Hardy and Johnson:

> Dave, Ken,
>
> We are at the point where I need to get your intentions in writing to help us move forward with the union.
>
> I wanted to give you these 4 in each area to at least inform you about Unions. Basically, they are casing [*sic*] more dues and increased hardships for you. In the past, the unions helped correct working cultures to ensure employees were treated fairly. That is not the case today. HR is working hard to protect your rights, and to ensure you have every tool, and support needed to protect your employment. States have laws that companies must follow. Paying a union to do what a company must due [*sic*] to laws and regulations places a middle man in the works, that you must pay due [*sic*] to have, that is no longer needed.
>
> Here are a few Pros and cons of the union.
>
> Pros:
>
> 1. Unions can increase pay and benefits for workers.
>   a. Both union and non-union are effected by any increase.
> 2. Unions set up formal processes for disputes.
>   a. Can make it easier to handle disputes These roles are now supported by HR.
> 3. Unions make political organizing easier.
>   a. Can make it easier to advance political causes.
> 4. Unions set Norms and Regulations.
>   a. Work to ensure standards that are met like the 40 hour workweek.
>
> Cons:
>
> 1. Unions can make it harder to promote great workers.
>   a. Unions tend to follow seniority. This can limit work to less experienced employees and dismiss poor work from a more senior person.
> 2. Unions can require dues and fees.
>   a. Union force you to join and set the price you must pay.
> 3. Unions can make it hard to diversify the workplace.
>   a. Unions have a closed culture and tend to protect member misconduct.

4. Unions can drive up cost and cause bad relationships between labor and management.
   a. Union leaders tend to protect their best interest at the mercy of the working relationship with management. Slow and disconnected teams and productivity.

To ensure that we are able to move forward and hire without limitations forcing new hires to join the union, I need a written or typed letter stating the following:

"I, David Hardy or Kenneth Johnson, do not want to be represented by the IBW [sic].

Thank you,

Sign and date." (handwritten signature).

(GC Ex. 2, 15). Clark's potentially misguided or ill-conceived communication was issued in response to employee concerns. (Tr. 172:12-15). Whatever can be said about Clark's communication, however, nothing in Clark's hearing demeanor or testimony betrays intentional or knowing animus. Put simply, the communication obviously flows from a fair degree of haplessness, as opposed to maliciousness.

E. The Union Raises Its Objections to Clark's Communication with Nixdorf.

On Tuesday, October 16, 2018, the Union, through Marzullo, e-mailed Nixdorf concerning certain bargaining matters. (GC Ex. 7). Marzullo's e-mail also took specific exception to Clark's communication, which was attached in its entirety. (GC Ex. 7).

After describing the Union's concerns, Marzullo's e-mail specifically states: "If ADT is unwilling to disavow these statements, I will be filing a ULP charge with the NLRB to address the matter." (GC Ex. 7). Marzullo's e-mail concludes:

5. ADT must immediately sent a letter to Dave Hardy and Kenneth Johnson retracting the Clark communication, indicating that the Union is the designated bargaining representative for the bargaining unit, and advising it will not, in any way, interfere with the employees' ability to join or be represented by the Union. If a

> letter is not sent by close of business on Friday, October 19, the Union will file a ULP charge on Monday morning.

(GC Ex. 7). Nixdorf reviewed Marzullo's communication (and the attachment) and had "concerns." (Tr. 240:4-13). As a result, Nixdorf immediately instructed Clark to discontinue any union-related communications with employees. (Tr. 240:12-13). In addition, neither Nixdorf nor the Company took any action related to any employee action traceable to Clark's communication. (GC Ex. 16, 17, 18, 23; R. Ex. 5; Tr. 246:14-21).

In addition, Nixdorf and Marzullo discussed the Clark communication over the telephone at some time between October 16 and October 18, 2018. (Tr. 245:5-17).

F. The October 18, 2018, Bargaining Session and Related Activity

The parties convened another bargaining session (either the second or third, depending on one's view of the May 2018, meeting) on October 18, 2018. (Tr. 247:5-8). Two significant events occurred during this session.

G. The Company Disavows the Clark Communication

First, the Parties discussed the Clark communication and the Union's request for disavowal or repudiation. (Tr. 88:3-14). On October 18, 2018, Nixdorf drafted a potential "cure" and forwarded it to Godden and Marzullo at 11:07 a.m. (Co. Ex. 1). Nixdorf's communication specifically seeks Union approval and input:

> Al-
>
> As we discussed yesterday, I appreciate your offer to resolve this issue without going through the ULP process. I know Ben [Clark] had been asked questions regarding the union and the text was he [*sic*] thought was an efficient way to respond. Below, is the e-mail I plan to send out. **I [*sic*] there anything else you think I should add?**
>
> Thanks again,
> Jim

(Co. Ex. 1) (emphasis added). Despite their attempts to evade the fact, both Godden and Marzullo ultimately admitted that they approved Nixdorf's "cure" on behalf of the Union. Godden testified as follows:

> Q. And it [the Nixdorf "cure"] was discussed amongst the parties across the table during the 8—October 18 meeting, right?
>
> A. Yes.
>
> Q. And the Union through Mr. Marzullo agreed, yes, that's good enough, fair?
>
> A. Yes.

(Tr. 88:6-11). Marzullo similarly admitted, "Yes, I approved it. No dispute with that." (Tr. 139:17).

After securing the Union's express approval, and due to a low computer battery, Nixdorf used Marzullo's computer to forward the Company's disavowal to the impacted employees. (Tr. 135:20-236:13, 241:2-9). Nixdorf's e-mail was sent to Brady, Clark and Johnson at 1:31 p.m., on October 18, 2018, and stated:

> All-
>
> You may have received a text message from Ben Clark in response to some questions regarding the IBEW. I wanted to clarify any confusion that may have occurred and ensure that ADT will not retaliate in any way against any employee because of their membership in a union. ADT has a clear policy and will treat employees fairly regardless of whether they belong to a union or not. ADT will honor its obligations with the IBEW and any other union and negotiate in good faith. Make no mistake, the decision to be represented by a Union or not rests solely with employees. ADT will honor its employees' decision.
>
> As you may know, there is an expired collective bargaining agreement which ADT is negotiating with the IBEW. All

employees working in the service area formerly covered by the Albany office are covered by the terms and conditions of that contract; however, there are some provisions, since the contract expired, which currently do not apply. Once the contract is renewed all provisions will apply.

If you have any further questions regarding the contract, please feel free to contact me at the number below.

(R. Ex. 3) (emphasis in original). Having addressed the Clark communication, the Parties returned to open bargaining issues.

H. The Parties Reach Tentative Agreement, Subject to Ratification.

Subsequently, on October 18, 201, the parties reached full tentative agreement on any and all open bargaining issues. (GC Ex. 4). Significantly, the agreement included a retroactive lump sum wage payment dating back to June 11, 2018—a period of approximately five (5) months. (GC Ex. 4, p. 7).

Consistent with historical practice and, notwithstanding the General Counsel's attempts at distraction through references to "formal ground rules" and "union by-laws," the Union proceeded to advance the tentative agreement for ratification. Marzullo clearly and unequivocally testified as follows:

Q. Sir, you could have signed the agreement once the full TA was reached, right?

A. Say that once more.

Q. The Union could have executed the agreement as soon as full tentative agreement was reached, right?

A. We could have, yes.

Q. You didn't do that, did you?

A. We did not.

Q. You chose to go the ratification route, right?

A. We did.

Q. You told the Company that's the route you were going?

A. Did not.

Q. You did tell the Company you were going to ratify, right?

A. Yes, that we were going to ratify, yes.

(Tr. 284:7-20). To that end, the Union took various steps to secure ratification following October 18, 2018.

I. The Events of November 2, 2018

There is no evidence whatsoever that Clark, Nixdorf, or any other Company official communicated with employees regarding union-related issues between October 18, 2018, and November 2, 2018. Thus, Clark heeded Nixdorf's admonishment to cease union-related communication. (Tr. 240:12-13). Nixdorf, in addition, succeeded in reaching tentative agreement with the Union fully aware (as was the Union) that a successor contract would block any decertification or withdrawal of recognition effort. (Tr. 99:17-24, 247:20-23). Nixdorf also provided the Union with Hardy's cell phone number in an effort to enhance Union/employee communication. (R. Ex. 6; Tr. 250:15-20). In addition, the tentative agreement armed the Union with a significant selling point— **retroactive lump sum wage increases for a five (5) month period**. (GC Ex. 4).

As previously noted, the Union had already communicated with employee Brady and secured his commitment to contract ratification. (Tr. 30:11-15). The Union was aware that employee Hardy had expressed misgivings about union representation dating back as far as May 2018, long before any communications from Clark. (Tr. 83:13-14). Brady, further, was aware that Johnson expressed a certain ambivalence regarding the Union. (Tr. 55:10-18).

Over the course of two (2) weeks, the Union invited Johnson and Hardy to participate in the ratification process. (GC Ex. 14). Neither Johnson nor Hardy showed up on November 2, 2018, and, therefore, Brady, alone (and belatedly), "ratified" the contract. (Tr. 48:4-20, 51:14-20).

According to Godden, he discussed the contract with Hardy while en route to Albany on November 2, 2018. (Tr. 94:23-95:11). Godden admitted Hardy told him ratification was a "waste of time" because Hardy and Johnson intended to vote down the tentative agreement. (Tr. 95:1-3). While the exact sequence of the conversation is unclear, Godden indisputably told Hardy: (1) only Union "members" would be permitted to vote on the contract; and (2) that Godden intended to push through with the ratification process, despite concerns voiced by the majority of the bargaining unit. (*See generally*, Tr. 94-95). Notably, there is no indication whatsoever that Godden attempted to "sell" the tentative agreement's terms (including substantial retroactivity) or, in any other way, assuage Hardy's concerns.

After his discussions with Godden, Hardy contacted Nixdorf at some point in the mid-afternoon. On November 2, 2018, Nixdorf was in Lexington, Kentucky, at the time, finalizing a different IBEW contract. (Tr. 254:8-11). Hardy described his conversation with Godden and Hardy's concerns. (Tr. 255:21-256:20). Nixdorf explicitly told Hardy that the contract would apply to all bargaining unit employees once ratified, regardless of any individual sympathies. (Tr. 256:10-11). Despite substantial experience in union campaigns and related standards, Nixdorf refrained from any persuasive activity during his conversations with Hardy. (Tr. 257:11-19). Again, Nixdorf himself has recently reached the tentative agreement that would serve (once ratified) to shield the Union from any decertification effort. (GC Ex. 4).

At approximately 2:35 p.m., Hardy and Johnson texted Nixdorf signatures on a statement expressing dissatisfaction with the Union. (R. Ex. 7). Nixdorf, aware of the distinction between

union "membership" and union "representation," relayed information regarding that distinction to Hardy. (R. Ex. 7). Nixdorf deemed this guidance "ministerial" in nature, and appropriate, given that Hardy had fully explained what Hardy and Johnson intended to do. (Tr. 258:5-24).

While traveling from Lexington, Kentucky, Nixdorf secured sample signatures of both Hardy and Johnson. (R. Ex. 7, 8, 9; *see generally* Tr. 261-66). Based on a layman's observation, Nixdorf concluded that the texted signatures were, in fact, those of Hardy and Johnson. (*Id.*). At 2:46 p.m., Nixdorf e-mailed Marzullo and informed him of the Union's loss of majority support and objective evidence of same. (GC Ex. 9). Nixdorf did not attach the supporting signatures due to computer issues related to his flight. (Tr. 266:12-25). Upon landing, however, Nixdorf sent Marzullo a second e-mail at 7:36 p.m. (EDT), including the signatures, evidencing the lack of majority support. (*Id.*).

In the meantime, the Union (meaning Godden and Brady) proceeded with its one person "ratification vote." (Tr. 96:10-13, 267:10-15). The Union concluded its proceedings at approximately 5:42 p.m. (EDT). (Tr. 96:10-13). Indisputably, however, the ratification concluded after the objective evidence proving the loss of majority support was provided to Nixdorf. (Tr. 267:1-15). Likewise, the Union was alerted to its loss of majority support hours before Brady cast the lone ballot regarding the tentative agreement. (GC Ex. 9; Tr. 267:1-15).

J. The Union Contests Its Clear Loss of Majority Status

On Monday, November 5, 2018, Marzullo e-mailed Nixdorf concerning the withdrawal of recognition. (GC Ex. 11). Marzullo's communication contends that the objective evidence concerning the loss of majority support was "unlawfully procured." (GC Ex. 11). Marzullo presents no basis for this contention (and the Record supports none) beyond an apparent reference back to the already cured Clark communication. (GC Ex. 11).

The Union subsequently sought execution of a collective-bargaining agreement, which the Company declined based upon the loss of majority support. (GC Ex. 11, 12). In the months following, the Union filed charges contesting alleged "unilateral changes" in wages and employment terms. (GC Ex. 1(j)). These allegations all involve changes that post-date the Company's withdrawal of recognition and, therefore, essentially turn on the withdrawal's propriety and the Union's status with respect to majority support.

ARGUMENT

A. Statements Made By Clark Do Not Violate The Act

Statements made by Clark do not violated the Act. The Board has consistently held statements that are not threatening and factual in nature are lawful under the Act. *See e.g.*, *American Showa, Inc.*, 331 NLRB 221 (2000) (adopting judge's finding of lawfulness regarding statement that, "We believe that a union is not in your best interested or in the best interest of the company"); *J.D. Hinkle & Son's, Inc.*, 301 NLRB 801 (1991) (owner's statement that "[he] would not permit a union to run his company" not Section 8(a)(1) violation where "devoid of any immediate context that might have given it a more threatening character"); *Tri-Cast*, 274 NLRB 377 (1985) (employer may couch comments in terms of what might happen in certain events occur without being unlawful); *Oxford Pickles*, 190 NLRB 109 (1971) (accurate statements of law and fact cannot amount to implied threats). Here, a member of management, who admittedly knows nothing about unions and has not worked in a unionized environment, sent communications to employees, without realizing the conduct was no malice or any evidence of a threat. The employees continued to communicate with him, and Clark did not his statements were ill-advised until corrected by Nixdorf. Moreover, statements made Clark, in Clark's mind were factual in nature. Accordingly, no violation of Section 8(a)(1) can be found.

B. The Company Effectuated A Proper Cure To Any Potential Section 8(a)(1) Violation

Assuming, *arguendo,* that the General Counsel can identify an unlawful Company communication, the Company clearly effectuated a proper cure wholly apart from the Union's majority status issues. In fact, Nixdorf's October 18, 2018, communication to employees fully satisfies any and all requirements for a proper repudiation under long-standing Board precedent. While not required, Nixdorf's communication was accompanied by the Union's prior review and agreement with respect to the statement's sufficiency. (Tr. 88:4-14, 139:9-17).

The Board's "settled law" holds that "under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct." *Passavant Mem. Hosp.*, 237 NLRB 138 (1978). Proper repudiation requires that a disavowal of an unfair labor practice was: (1) timely; (2) unambiguous; (3) specific in nature to the unlawful conduct; (4) free from other proscribed conduct; (5) adequately published to the employees involved; (6) accompanied by assurances that the employer will not interfere with employees' Section 7 rights in the future; and (7) not followed by any additional illegal conduct. *Foster Elec.,* 308 NLRB 1235, 1260 (1992) (discussing *Passavant*); *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 566 (1st Cir. 2016) (employer's burden to demonstrate repudiation); *Gaines Elec. Co.*, 309 NLRB 1077, 1082 (1992) (applying *Passavant* to Section 8(a)(1) allegations). The Company's repudiation of the Clark communication clearly meets each and every standard.

With respect to timeliness, Nixdorf issued the disavowal within approximately a week of the Clark communication and within approximately forty-eight (48) hours of the Union's notification. (R. Ex. 3; GC Ex. 7). In addition, upon receipt of the Union's complaint, Nixdorf immediately contacted Manzullo, and started working to address any issue. (Tr. 240:12-13). This

prompt response satisfies Board standards. *See generally, Phillips Indus. Components*, 216 NLRB 855, 855, n.2 (1975) (deeming two (2) weeks untimely).

Likewise, Nixdorf's e-mail is unambiguous and specifically addresses communications from Clark. (R. Ex. 3). The communication issued to all three (3) potentially impacted bargaining unit members. (R. Ex. 3). Likewise, the statement includes future looking assurances that the Company will "not retaliate," will "treat employees fairly regardless of whether they belong to a union or not," and "will honor its obligations with the IBEW." (R. Ex. 3).

Finally, there is no evidence that Clark's statement coincided with any other proscribed conduct. With respect to the "not followed by any additional illegal conduct" requirement, the General Counsel musters no allegations whatsoever to save alleged "unilateral changes" that survive only if the Company's withdrawal of recognition weeks early is deemed inappropriate. Beyond these redundant claims, no evidence suggests any allegation of unlawful conduct concurrent with or following Clark's communication.

C. The Company's Withdrawal Of Recognition Was Wholly Proper

An employer may lawfully and unilaterally withdraw recognition from an incumbent union by demonstrating reasonable certainty that "the union has actually lost the support of the majority of bargaining unit employees." *Levitz Furniture,* 333 NLRB 717, 717 (2001). Anti-union petitions or statements signed by unit employees (usually cards or signature sheets) satisfy *Levitz's* requirements. *See,* Casehandling Manual, Part 2 at 11041. Here, the signatures and statements of employees Johnson and Hardy clearly satisfy *Levitz's* requirements. (R. Ex. 7).

Notably, the General Counsel essentially concedes that these employee signatures constitute objective evidence of employee dissatisfaction with the Union. Cognizant of this reality, the General Counsel relies upon a "taint" theory harkening back to the Clark communication. As

noted above, the Company, as a legal matter, effectively repudiated (with Union involvement and permission) the Clark communication weeks before the attempted ratification vote and the employees' anti-union statements.

As a practical matter, the General Counsel's theory simply conflicts with the Record. The Clark communication was issued on October 9, 2018, and was effectively repudiated as of October 18, 2018. That same day, the Company reached full tentative agreement with the Union, knowing full well that a contract, once finalized, would serve as a bar to any decertification or withdrawal of recognition matter. There is no evidence or even suggestion that Clark, Nixdorf, or the Company generally took any steps regarding the Union's representative status between October 18, 2018 and the November 2, 2018, withdrawal of recognition.

If searching for a triggering event for its loss of majority status, the Union need look no further than a mirror. The record is replete with indications that the Union treated its bargaining unit as significant only insofar as it involved employee Brady, the lone Union "member." The Union admits full awareness that employee Hardy (who, alone, constitutes either 50% or 33% of the "unit") was "not into the union thing" as early as May 2018. (Tr. 83:13-14). Likewise, despite his apparent efforts, employee Brady could not muster any claim of union support by employee Johnson, despite Brady's admitted efforts at persuasion. (Tr. 55:1-56:3). Instead of engaging its constituents, the Union essentially ignored Hardy and Johnson until the eve of the supposed ratification vote.

On the day of that vote, essentially for the first time, Union Official Godden contacted employee Hardy. Hardy expressed both his and Johnson's satisfaction concerning the tentative agreement and the Union. Godden admittedly responded by arguing "ratification vote eligibility" with Hardy and expressing the Union's intention to simply "continue" – irrespective of employee

support or lack thereof. Again, there is no indication that Godden highlighted highly favorable contract terms (including a meaningful retroactivity period) or the potential benefits of union representation. Instead, the only conclusion that can be drawn from the record is that Godden's interactions with Hardy ended in conflict.

Put simply, it is the Union's belated and failed attempt to engage its bargaining unit constituents that triggered the employees' anti-union petition. No other conclusion is tenable, given the Record. The Company clearly was not "orchestrating" any effort as of November 2, 2018, as evidenced by the standing tentative agreement and the lack of any attempt, whatsoever, at "persuasion." In fact, the derailed ratification effort occurred while Nixdorf was hundreds of miles away from Albany, New York, and finalizing a different IBEW agreement.

There is no rational basis for ascribing the sentiments of Hardy and Johnson to any alleged Company misconduct. To the contrary, the Union clearly and exclusively focused on one bargaining unit member (Brady) at the expense and neglect of the majority (Hardy and Johnson). Given this reality, the anti-union petition is neither surprising nor traceable to any unlawful conduct or undue interference.

D. The General Counsel's Various Conspiracy Theories Strain Credulity

At various points throughout the Record, the General Counsel ascribes the Union's loss of majority support to: (1) the supposedly improper retention of employee Hardy; (2) an elaborate and undefined plot hatched by personnel with no labor, responsibilities, whatsoever established by internal communications surrounding the Albany office closure; and/or (3) a wildly unfathomable nationwide plot by the Company to undermine union representational status which, for unexplained reasons, supposedly targeted the smallest bargaining unit possible. These allegations, beyond lacking any evidentiary support, simply defy logic.

Again, an employer coercing or plotting a decertification or withdrawal of recognition effort simply would not engage in the Company's bargaining conduct. The Parties reached full tentative agreement in either two (2) or three (3) bargaining sessions. The ultimate agreement included terms largely favorable to the Union, most notable full wage increase retroactivity. The tentative agreement, if ratified, would clearly "slam the door" on any challenge to the Union's majority status—a fact fully known to the Company's and Union's representatives. Finally, beyond the Clark communication, the Record is devoid of any campaign or persuasive activity designed to contest the Union's representational status.

For all of these reasons, the General Counsel's various strained assertions should be disregarded.

E. A Contract Bar Did Not Exist, As Ratification Was Not Achieved Prior To Withdrawal.

The Record clearly establishes that the successor collective-bargaining agreement was not finalized, absent ratification, and, therefore, the General Counsel may not rely on any contract bar theory as a defense against the withdrawal of recognition.

As a threshold matter, the Parties' course of conduct (most notably, the 2009 bargaining cycle) conclusively establishes that both the Union and the Company understood ratification as a prerequisite to contract finalization. (R. Ex. 4, Tr. 243:2-8). Second, the Union repeatedly admitted that, while not required to do so, it chose to proceed with ratification as the final and necessary step to the bargaining process. (*See, e.g.*, Tr. 284:7-23). Third, and most significantly, ***the tentative agreement itself (including the Union's own underlying proposals) require ratification***. (*See* GC Ex. 4, p. 6) (new alarm technician schedule "***At Ratification***")(emphasis added).

The Board has held, "Accordingly, failure to effect ratification where it is contemplated as the final step in the bargaining process, prevents the contract from operating as a bar for the reason

that until ratification occurs, the relationship between the contracting parties cannot be deemed stabilized." *See, e.g., Westinghouse Elec. Corp., Small Motor Div.*, 111 NLRB 497, 499 (1955). Here, the Union, alone, controlled whether to seek ratification and how that process was to proceed. Having failed to secure ratification prior to the loss of majority support, the contract bar doctrine lends no support to the General Counsel's position.

CONCLUSION

While certain portions of this submission seek to preserve arguments regarding certain Company conduct, a suggestion of blamelessness should not be implied. As noted by Nixdorf, the Company would not have repudiated certain statements had those statements not generated "concern." Unfortunate statements and amateurish attempts at communications concerning union matters aside, however, the undisputed facts merit dismissal of the Consolidated Complaint in its entirety.

The primary purpose of the Act is to effectuate employee free choice concerning engaging in or refraining from union activities. Here, the Company and Union reached a full tentative agreement free from any coercive statement and with every assumption that the Union retained majority support. Only after the Union's communications with its own constituents failed, was the lack of majority support relied upon and the employees' anti-union sentiment deemed clear. No Company action contributed to this chain of events beyond reaching a tentative agreement through good-faith negotiations.

For all of these reasons, the Company respectfully requests that the Administrative Law Judge dismiss the Consolidated Complaint in its entirety.

Respectfully submitted on this 12th day of June, 2019.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADT, LLC d/b/a ADT SECURITY SERVICES

and **Case Nos.: 03-CA-230714**
03-CA-234585

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 43

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONDENT ADT, LLC, D/B/A ADT SECURITY'S POST-HEARING BRIEF** was served on the following parties on the 12th day of June, 2019:

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